WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
September 2006

This calendar contains cases that originated in the following counties:

Dane
Douglas
Kenosha
Milwaukee
Pepin
Racine
Sheboygan
Waukesha
Winnebago

These cases will be heard in the Wisconsin Supreme Court Hearing Room, 231 East Capitol:

THURSDAY, SEPTEMBER 7, 2006

9:45 a.m.	04AP2655	Steven C. Tietsworth v. Harley-Davidson, Inc.
10:45 a.m.	04AP583	State ex rel. Frederick Lee Pharm v. Byran Bartow
1:30 p.m.	05AP189	Industrial Roofing Services, Inc. v. Randy J. Marquardt

TUESDAY, SEPTEMBER 12, 2006

9:45 a.m.	05AP1189-CR	State v. Monika S. Lackershire
10:45 a.m.	04AP2542-D	Office of Lawyer Regulation v. Willie J. Nunnery
1:30 p.m.	05AP685	Acuity Mutual Insurance Company v. Miguel A. Olivas

WEDNESDAY, SEPTEMBER 13, 2006

9:45 a.m.	05AP1516-CR	State v. David Allen Bruski
10:45 a.m.	05AP573-CR	State v. Gary A. Johnson
1:30 p.m.	05AP544	DaimlerChrysler v. Labor and Industry Review Commission

The Supreme Court calendar may change between the time you receive this synopsis and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. These summaries are not complete analyses of the many issues that each case presents. They are a service of the Director of State Courts Office/Amanda Todd, Court Information Officer 608-264-6256.

WISCONSIN SUPREME COURT
THURSDAY, SEPTEMBER 7, 2006
9:45 a.m.

04AP2655 Steven C. Tietsworth v. Harley-Davidson, Inc.

This case is related to one the Supreme Court heard in November 2003 and decided in March 2004.[1] *This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed an order of the Milwaukee County Circuit Court, Judge Michael Guolee presiding.*

This is a products liability case involving a group of Harley-Davidson motorcycle owners who sued the company over an alleged defect in their cycles' engines. When the Supreme Court first heard this case in 2003, the owners acknowledged that they had not yet had problems with the engines, but argued that the defect increased the likelihood of malfunctions and therefore decreased the motorcycles' value. The owners maintained that Harley knew about the defect and failed to disclose it, marketing the cycles as "filled to the brim with torque and ready to take you thundering down the road."

The majority of the Court did not find that argument persuasive.[2] Justice Diane S. Sykes, who is no longer a member of this Court, wrote for the majority:

> An allegation that a product is diminished in value because the product line has demonstrated a propensity for premature failure such that the product might or will at some point in the future fail prematurely is too uncertain and speculative to constitute a legally cognizable tort injury and is therefore insufficient to state damages in a tort claim for fraud. In addition, the economic loss doctrine bars this claim.

The majority opinion also noted that, while the Harley owners would not be permitted to pursue claims based upon allegations of fraud and deceptive trade practices, the owners had other remedies at their disposal, including enforcement of the contract and the warranty. Those are exactly the remedies that the owners (Steven C. Tietsworth et al) are now trying to pursue. After the original Supreme Court decision, Tietsworth filed a motion to re-open the matter in the circuit court, but the circuit court denied that motion. The Court of Appeals, however, reversed.

The Supreme Court is expected to determine if these litigants will be permitted to re-open their class-action lawsuit against Harley-Davidson.

WISCONSIN SUPREME COURT
THURSDAY, SEPTEMBER 7, 2006

[1] Steven Tietsworth v. Harley-Davidson Inc., 2004 WI 32

[2] Chief Justice Shirley S. Abrahamson dissented. Justice Diane S. Sykes, who no longer is a member of the Court, wrote for the majority, which included Justices Jon P. Wilcox, N. Patrick Crooks, David Prosser Jr., and Patience Drake Roggensack. Justice Ann Walsh Bradley did not participate.

10:45 a.m.

04AP583 State ex rel. Frederick Lee Pharm v. Byran Bartow

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a ruling of the Winnebago County Circuit Court, Judge Bruce Schmidt presiding.

This case calls upon the Wisconsin Supreme Court to interpret the Interstate Agreement on Detainers (IAD), which provides a procedure for states to transfer their prisoners to another state for trials of pending criminal charges and service of any resulting sentences. The question presented here is whether Wisconsin has the authority to impose an indefinite mental commitment on a prisoner transferred here to serve his Wisconsin sentence after a criminal conviction.

Here is the background: Frederick Lee Pharm was living in Nevada in June 1976 when he was arrested and charged with first-degree intentional homicide. He pleaded guilty and was sentenced to life in prison. Eleven years later, in October 1987, Wisconsin authorities issued a detainer (a request that Pharm be transferred to Wisconsin) so that Pharm could answer to two charges that were pending against him here. The charges involve sexual assault of a child.

Pharm waived extradition and was transferred to Wisconsin in January 1988. He was tried and convicted in Milwaukee County Circuit Court, and was sentenced to 15 years in prison to be served after he completed his imprisonment in Nevada.

Nevada paroled Pharm in 1990 and transferred him to the custody of the Wisconsin Department of Corrections (DOC). Nevada authorities told the DOC, however, that they expected Pharm to return to Nevada to serve his parole time after his release from his Wisconsin sentence. Pharm served his criminal sentence here and was scheduled for release in 1997. On his mandatory release date, the Milwaukee district attorney filed a petition seeking to have him held indefinitely as a sexually violent person. A hearing was held and a jury concluded that Pharm did, in fact, meet the criteria contained in Chapter 980, Wisconsin's so-called Sexual Predator Law, which provides that certain sex offenders may be held indefinitely under civil law in locked mental health facilities after they serve their prison sentences.

Pharm challenged this civil commitment as a sexually violent person on several grounds, arguing, among other things, that the IAD and Pharm's waiver of extradition under the IAD only permitted Wisconsin to detain him to face the criminal charges and to serve the resulting criminal sentence. He did not, he argues, agree to return to Wisconsin for mental treatment.

The Court of Appeals concluded that the IAD and the waiver were appropriately used to bring Pharm back to Wisconsin, and that these agreements ended with the end of Pharm's criminal sentence. Because they no longer applied, the appeals court found, the State could not have violated them in placing Pharm under civil commitment. Pharm disagrees.

The Supreme Court will determine whether prisoners transferred into Wisconsin under the IAD to face criminal charges may also be subject to civil commitment as a sexually violent person once they complete the service of their criminal sentence.

WISCONSIN SUPREME COURT
THURSDAY, SEPTEMBER 7, 2006
1:30 p.m.

05AP189 Industrial Roofing Services, Inc. v. Randy J. Marquardt

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed an order of the Waukesha County Circuit Court, Judge Robert G. Mawdsley presiding.

This case involves a company whose lawsuit was dismissed, with prejudice, after its lawyer failed to meet deadlines. The Supreme Court is expected to decide if the circuit court was wrong to dismiss the case, given that the company was unaware that its lawyer was not doing his job.

Here is the background: On June 19, 2003, Industrial Roofing Services, Inc. filed a lawsuit against a group of former employees and a company officer who quit en masse and set up their own roofing company. Industrial alleged that they had conspired to take customer data and use it to compete against him.

Industrial hired an attorney who missed deadlines and failed to keep Industrial informed of court dates. The court imposed fines against Industrial, warning that more severe sanctions would follow if Industrial did not comply with court orders. The problems continued, and ultimately the court dismissed Industrial's case – although Industrial was given a chance to resurrect the case if, within 60 days, it paid the other side's attorney fees and the fines that had been imposed, and demonstrated that it had a viable case. This did not occur, and the case was dismissed with prejudice.

Industrial hired a different attorney and appealed, arguing that the original lawyer had not informed it of the motions to dismiss or the court-ordered sanctions. It maintained that it had trusted the lawyer to handle the case and should not be penalized for the lawyer's failures.

The Court of Appeals affirmed the circuit court decision, relying upon a 1991 Wisconsin Supreme Court holding that a litigant is ultimately responsible for his/her lawyer's failure to comply with court orders.[3]

Industrial argues that this case differs from the 1991 case in significant ways. It argues that: (1) the missed deadlines in this case caused delays of months, rather than years, as in the 1991 matter; (2) the trial court in this case could have imposed other sanctions (in fact, the original attorney explained to the court that he was having emotional problems and asked that any sanctions be applied against him, and not his client; and (3) the trial court in this case mistakenly believed that Industrial's president was aware of the pending motion to dismiss.

The Supreme Court will determine whether Industrial will be given another chance for a day in court.

WISCONSIN SUPREME COURT

[3] Johnson v. Allis Chalmers Corp., 162 Wis. 2d 261, 283-285, 470 N.W.2d 859 (1991)

TUESDAY, SEPTEMBER 12, 2006
9:45 a.m.

05AP1189-CR State v. Monika S. Lackershire

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed an order of the Pepin County Circuit Court, Judge Dane F. Morey presiding.

This case involves a young woman who was charged with sexual assault after having intercourse with two 14-year-old boys.[4] The Supreme Court is expected to decide if the woman should be permitted to withdraw her 'guilty' plea.

Here is the background: In November 2003, Monika S. Lackershire, who was then 20, was charged in two separate cases with sexual assault of a child for having intercourse with Steven G. and Joseph C., both of whom were 14 at the time. Later, additional charges of second degree sexual assault were added in each case.

Lackershire entered into a plea negotiation with the State. She agreed to plead guilty to one count involving Steven, and the State agreed to dismiss all remaining counts. The court accepted the plea and sentenced Lackershire to three years in prison followed by six years' extended supervision. Six months later, Lackershire filed a motion seeking to withdraw her plea or modify the sentence. The motion was denied.

Lackershire took her case to the Court of Appeals, which affirmed the trial court. The Court of Appeals weighed, and found not credible, Lackershire's contention that she had assumed the dropped charges would not be read into the record and considered at sentencing. The court also stated that the effect from "reading in" dismissed offenses need not be explained at the plea hearing in order for the plea to be knowing and voluntary.

Now Lackershire has come to the Supreme Court, where she argues, among other things, that her plea was involuntary because she did not understand the impact on sentencing of the other three charges being read in at sentencing. In addition, she claims that she believed that she would not be permitted to delay a trial, and that she felt pressured to avoid an immediate trial because she was pregnant and feared she could not endure such a proceeding without risking her own health or the fetus' health.

The Supreme Court will decide if Lackershire will be permitted to withdraw her plea.

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[4] Wis. Stat. § 948.02(2) provides that anyone who has sex with a person who is under the age of 16 has committed a Class C felony.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 12, 2006
10:45 a.m.

04AP2542-D Office of Lawyer Regulation v. Willie J. Nunnery

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation investigates and, if warranted, prosecutes the attorney. A referee – a court-appointed attorney or reserve judge – hears the discipline cases and makes recommendations to the Supreme Court.

This case involves Madison Atty. Willie J. Nunnery, who operates the Nunnery Law Office and who has been licensed to practice law in Wisconsin for 30 years. He often represents clients in employment discrimination and civil rights cases.

The Office of Lawyer Regulation (OLR) charged Nunnery with 14 counts of misconduct related to six client matters. A referee concluded that 13 of the counts had merit, and recommended a two-month license suspension and payment of about $7,000 in costs. Nunnery is appealing the findings in just one count involving one client.

Here is the background on that count: In 1997, a woman hired Nunnery to represent her in a possible lawsuit against Madison Area Technical College (MATC). She alleged that she had faced racial discrimination and sexual harassment by MATC personnel, and provided Nunnery with a number of laminated documents – memos, e-mails, and letters – that she said had been sent to her by various MATC personnel. The papers contained racially derogatory comments, along with references to sexual assaults, harassment and threats. She assured Nunnery that the documents were authentic, and said she had laminated them to prevent theft (a story that the referee later called "absurd").

Nunnery filed the woman's lawsuit in the U.S. District Court for the Western District of Wisconsin. MATC's lawyer sent Nunnery affidavits from MATC personnel saying that the documents were fabrications, and expressed several times his concern that Nunnery had not reasonably inquired as to the truth of the allegations. MATC also produced a 1997 independent medical examination of the woman that showed a disorder marked by pathological lying.

Ultimately, the U.S. District Court dismissed the complaint and ordered Nunnery and his client to pay MATC's attorney fees, which totaled more than $16,000. Federal Judge Barbara Crabb remarked in court that, "This is truly, and without any competition, the most blatant case of a Rule 11 [a rule of civil procedure that obligates lawyers to present only information that they believe to be truthful] violation that I've ever seen."

When the OLR referee reviewed this matter, he concluded that Nunnery had failed to provide competent representation to his client by failing to make meaningful inquiry into the veracity of the suspicious documents. Nunnery, on the other hand, argues that he is the victim of an untruthful client.

The Supreme Court will determine what discipline to impose on Nunnery.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 12, 2006
1:30 p.m.

05AP685 Acuity Mutual Insurance Company v. Miguel A. Olivas

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a ruling of the Sheboygan County Circuit Court, Judge James J. Bolgert presiding.

This is a dispute over worker's compensation premiums. The Supreme Court is expected to clarify how the determination of whether a worker is an employee or an independent contractor, for the purpose of setting a premium under a worker's compensation insurance policy, is to be made.

Here is the background: Miguel Olivas is a drywaller. He obtained work as an independent contractor from Steve Tenpas, owner of a drywall business. Tenpas told Olivas that he hired only subcontractors who had worker's compensation and liability insurance, so Olivas obtained insurance from Acuity Mutual Insurance Co.

Olivas' policy contained an earnings estimate of $25,000 annually; however, the policy provided that the final premium would be determined using actual earnings. In April 2003, Acuity audited Olivas' account using 1099 forms obtained from Tenpas. The forms revealed earnings of more than $190,000, and it came to light that Olivas worked with several other drywallers who did not have insurance certificates. The auditor concluded that these other drywallers were Olivas' employees, which increased Acuity's exposure to liability. Acuity then increased Olivas' premiums, but Olivas did not pay and the policy was eventually canceled.

In October 2003, Acuity filed a complaint demanding $32,192.30 in unpaid insurance premiums plus interest. The trial focused on whether the individuals working with Olivas were employees or independent contractors. The auditor testified that she had concluded the workers were employees because (1) none of them had insurance coverage, (2) they worked together as a crew, doing identical work, and Olivas obtained all the jobs for the group; (4) Olivas issued 1099 forms to the rest of the crew; and (5) Tenpas paid only Olivas and not the other workers. Tenpas testified that he interacted only with Olivas and had no control over the other members of Olivas' crew.

Olivas testified that he worked with the others because they were his friends, not his employees, and that they did not communicate directly with Tenpas because they did not speak English. The trial court ultimately agreed that the workers were independent contractors rather than Olivas' employees, and dismissed Acuity's case.

Acuity appealed, and the Court of Appeals affirmed the circuit court, although in addition to discussing the statutory definition of 'independent contractor'[5] it also discussed the common law definition.

The Court of Appeals' introduction of the common law as a basis for answering questions related to worker's compensation now leads Acuity to ask the Supreme Court to clarify the test for whether a worker is an employee or an independent contractor for purposes of setting worker's compensation premiums.

[5] Wis. Stat. § 102.07(8)

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 13, 2006
9:45 a.m.

05AP1516-CR State v. David Allen Bruski

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a ruling of the Douglas County Circuit Court, Judge Michael T. Lucci presiding.

This case involves a police search of a travel bag. The Supreme Court is expected to determine if the search was legal.

Here is the background: At about 8 a.m. on March 3, 2005, a City of Superior police officer found David Bruski passed out in a parked car. The officer awakened him and attempted to question him, but reported that Bruski continued to nod off. He told the officer that he was waiting for a friend and had no idea how he had gotten into the car. Police called the vehicle's owner, who said she did not know Bruski, but that her daughter had borrowed the car. Bruski later indicated that he knew the daughter, but could only give her first name.

Police accompanied the owner to claim the car. When Bruski claimed that he did not have the car keys, the officer said he would search the car, and neither the owner nor Bruski objected. The search turned up a "makeup travel case" on the floor of the front passenger side. The officer opened the case, found drug paraphernalia and marijuana inside, and arrested Bruski. A search of Bruski revealed the car keys and more drugs.

Bruski was charged with possession of drugs. He filed a motion to suppress the evidence, arguing that the search was illegal. The State responded in two ways. First, it argued that Bruski had no expectation of privacy because he was in someone else's vehicle; second, it argued that the car's owner had given implied consent for the search. The circuit court concluded that the search had been illegal and barred the evidence.

The State appealed and the Court of Appeals reversed the circuit court.

Now in the Supreme Court, Bruski argues that individuals have a reasonable expectation of privacy in their personal belongings, and that an opaque travel case stowed next to its owner, inside a car parked behind a residence was obviously meant to be private. He argues that the issue of whether he had been invited to occupy the car was irrelevant to the question of whether the officer had the authority to search his bag.

The State, on the other hand, argues that a person who cannot demonstrate a legitimate claim to a vehicle can hardly expect that vehicle to be a private repository for his personal effects. The State also agreed with the Court of Appeals' conclusion that the question of whether a person has an expectation of privacy in a container that is searched is not answered by determining whether the person believed the container to be private.

The Supreme Court will decide if the police search of Bruski's travel bag was legal.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 13, 2006
10:45 a.m.

05AP573-CR State v. Gary A. Johnson

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a ruling of the Racine County Circuit Court, Judge Allan B. Torhorst presiding.

This case involves a man whose conviction on drug charges was overturned after the Court of Appeals concluded that the police search had been illegal. The Supreme Court is expected to determine whether police had a reasonable basis to search Gary A. Johnson's vehicle during a traffic stop.

Here is the background: On Nov. 5, 2003, two Racine police officers pulled Johnson over after they determined that the vehicle he was driving had an emissions suspension. Before they approached him, the officers testified, they saw Johnson bend forward as if to place or retrieve an object from under the driver's seat. The officers later testified that Johnson's motion was consistent with the effort to conceal drugs or a weapon during a traffic stop.

After one of the officers approached Johnson and told him why he had been stopped, Johnson produced papers showing that the vehicle had passed an emissions test. The officer asked Johnson to get out of the car. Johnson exited the car and told the officers that he had a bad leg. When one of the officers told Johnson that he was going to pat him down for weapons, Johnson did not object; however, when the officer's hands reached Johnson's left leg, Johnson fell down and complained of leg pain. After Johnson got back on his feet, the officer tried again, and again Johnson fell. At this point, the officers helped Johnson to the curb, where he sat.

The officers stopped their frisk and informed Johnson that they were going to search inside the car. He did not object. One officer found a clear plastic bag of marijuana under the driver's seat. They arrested Johnson, searched him more completely, and discovered cocaine in his left front pants pocket. Johnson was charged with one count of possession of cocaine with intent to deliver and one count of possession of marijuana.

In the trial court, Johnson made a motion to suppress the evidence, arguing that police had not had a reasonable suspicion to justify the vehicle search. The circuit court found that Johnson had consented to the search and denied the motion. Johnson then pleaded 'no contest' to the cocaine charge and the district attorney dismissed the marijuana charge. The circuit court sentenced Johnson to 18 months in prison.

Johnson appealed, and the Court of Appeals reversed his conviction after concluding that police had not had a reasonable basis to believe that he was dangerous. Now, the State has appealed to the Supreme Court, arguing that Johnson's reach under his seat, combined with the two falls during the pat-down search, gave police a reasonable basis to believe he might be armed and dangerous. The Supreme Court will decide if the police search of this motorist and his vehicle was proper.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 13, 2006
1:30 p.m.

2005AP544 DaimlerChrysler v. Labor and Industry Review Cmsn. and Glenn May

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Kenosha County Circuit Court, Judge Wilbur W. Warren presiding.

This case involves a dispute over assessment of disability for purposes of calculating disability payments. The Supreme Court is expected to determine whether a single disability assessment or multiple, stacked assessments are in order when a person undergoes several operations to address one injury.

Here is the background: On April 19, 1999, Glenn May hurt his left knee while on the job at DaimlerChrysler. He underwent reconstruction of his anterior cruciate ligament (ACL) and returned to work July 19. After returning to work, May experienced pain, swelling, and popping in his left knee. He continued working until April 2001, when he returned to the doctor, who concluded that he required a second ACL reconstruction. Six months later, the doctor submitted a report indicating that May's knee was "fully stable" and assessing a 10 percent permanent partial disability (PPD).

May sought compensation for a PPD totaling 25 percent – 15 percent from the first surgery and 10 percent from the second. DaimlerChrysler argued that the payment should be based on a 10 percent PPD according to the doctor's final report. A hearing examiner for the Department of Workforce Development ruled in favor of May.

DaimlerChrysler appealed to the Labor and Industry Review Commission (LIRC), which determined that the minimum PPD assigned to a particular surgery should be awarded for each time a person undergoes that surgery. Because the Administrative Code assigns a minimum disability of 10 percent for ACL repairs, the LIRC declared May to be 20 percent disabled.

DaimlerChrysler sought judicial review, and the circuit court upheld the LIRC award of 20 percent PPD. The company then took the case to the Court of Appeals, which certified to the Supreme Court, noting:

> The Worker's Compensation Act was created to eliminate litigation and alleviate tensions between employers and employees in the area of compensation for work-related injury. Without enunciation of a clear rule
> regarding LIRC's authority to award cumulative PPD ratings … there is a substantial likelihood that similar issues will continue to arise, litigation will increase, and employer-employee relations will suffer.

The Supreme Court will determine whether individuals who undergo multiple surgeries for one injury will be permitted to 'stack' the disability assessments, or if the final disability assessment is the only one that counts.